

IN THE MATTER OF LICENSE NO. 356 568
Issued to: Otto A. BENSON, BK - 264916

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1926

Otto A. BENSON

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 5 April 1971, an Administrative Law Judge of the United States Coast Guard at Detroit Michigan, suspended Appellant's license for ten days outright plus twenty days on nine months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as pilot under authority of the license above captioned, Appellant

(1) On board the Liberian M/V TROPICAL PLYWOOD, on or about 11 June 1970, did direct the navigation of said vessel at a speed in excess of 10 m.p.h. over the bottom in the St. Clair River in violation of the speed limit prescribed by the U.S. Army Corps of Engineers under the authority of 33 CFR 207.510 (d) (4) and made effective through publication in Notice to Mariners NCELO-O dated 13 August 1969 by the District Engineer, Detroit District; and

(2) On board the Norwegian M/V NORSE TRANSPORTER, on or about 19 June 1970, did direct the navigation of said vessel at a speed in excess of 10 m.p.h. over the bottom in the St. Clair River in violation of the speed limit prescribed by the U.S. Army Corps of Engineers under the authority of 33 CFR 207.510 (d) (4) and made effective through publication in Notice to Mariners NCELO-O dated 13 August 1969 by the District Engineer, Detroit District.

At the hearing, Appellant was represented by professional counsel, and entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence applicable notices to mariners, a chart of the St. Clair River, three Great Lakes Pilotage "trip tickets", and the testimony of six witnesses.

In defense, Appellant offered in evidence his own testimony.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and the above specifications had been proved. He entered an order suspending the license and merchant mariner's document issued to Appellant for a period of ten days outright plus twenty day on nine months' probation.

The entire decision was served on 7 April 1971. Appeal was timely filed and the brief was received on 29 October 1971.

FINDINGS OF FACT

On 11 and 19 June 1970, respectively, Appellant was serving as pilot on board the Liberian M/V TROPICAL PLYWOOD and the Norwegian M/V NORSE TRANSPORTER and acting under authority of his license while the vessels were on the St. Clair River, down the center of which lies the Canada/United States boundary.

Due to the disposition of this case, no further findings of fact are necessary.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that he erred in finding that the alleged speed violations occurred in United States waters.

APPEARANCE: McCreary, Ray, and Robinson, Cleveland, Ohio.

OPINION

The principal Coast Guard witness in this case testified that he clocked the TROPICAL PLYWOOD and the NORSE TRANSPORTER at excessive speeds over a 5.18 mile course on the St. Clair River. He was, however, unable to state that he observed these vessels to be in United States waters at the relevant times. The only evidence introduced on this issue was testimony by residents of the area as to what they had observed to be the customary navigating practices of commercial vessel operators concerning passage on either side of the international boundary. The Administrative Law Judge chose to infer from this testimony that the Appellant did in fact navigate United States waters during a substantial portion of

the passage through the above mentioned course. He inferred this despite the uncontradicted testimony of Appellant that he remained in Canadian waters at all pertinent times except for the last half mile of the course.

The evidence relied upon was clearly not substantial or even probative. This essential element could only be proven by evidence directly relative to the particular vessel trips involved. The poor substitute relied upon in this case is of questionable relevance. At best and certainly not an adequate basis for the Administrative Law Judge's findings.

It is true that Appellant testified to having navigated in United States waters for the last half mile of the above mentioned 5.18 mile course. But this testimony, together with evidence of the vessel's speed over the entire 5.18 mile course, does not admit of the inference that excessive speed prevailed over the final half mile in the absence of evidence that the speed of the vessel did, in fact, remain fairly constant. The Administrative Law Judge in effect placed upon Appellant the burden of proving that he did vary the speed of the vessel. Such a shift in the burden of proof was improper, there having been no prima facie established by the Investigating Officer.

In short, the Investigating Officer failed to prove a necessary element of the alleged offense, to wit, that the excessive speed occurred in "those waters as are within the United States," (33 CFR 207.510). Since it is apparent that there is no possibility of obtaining the evidence necessary to prove that element, no purpose would be served by remanding the case for further action.

ORDER

The order of the Administrative Law Judge dated at Detroit, Michigan, on 5 April 1971, is VACATED and the charge DISMISSED.

C.R. BENDER
Admiral, U.S. Coast Guard
Commandant

Signed at Washington, D.C., this 15th day of May of 1973.

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